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SUPREME COURT, U. S.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1961

## No. 113

BUFORD MALONE, JR., PETITIONER

*vs.*

JAMES A. BOWDOIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 23, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

# Supreme Court of the United States

**OCTOBER TERM, 1961**

# No. 113

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**BUFORD MALONE, JR., PETITIONER**

*vs.*

**JAMES A. BOWDOIN, ET AL.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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**INDEX**


| | Original | Print |
|---|---|---|
| Record from the United States District Court for the Middle District of Georgia | | |
| Removal petition | 1 | 1 |
| Petition filed in the Superior Court of Jasper County, Georgia | 5 | 3 |
| Process | 7 | 5 |
| Removal bond | 9 | 7 |
| Order extending time for filing defensive pleadings | 10 | 8 |
| Motion to dismiss complaint | 11 | 9 |
| Motion for more definite statement | 13 | 10 |
| Order extending time for filing answer | 17 | 13 |
| Amendment by plaintiff | 17 | 14 |
| Attachment—Plat of portion of Michael M. Toland Estate | 19 | 15 |

| | Original | Print |
|---|---|---|
| Record from the United States District Court for the Middle District of Georgia—Continued | | |
| Opinion granting motion to dismiss, Bootle, J. | 20 | 16 |
| Judgment | 23 | 18 |
| Notice of appeal | 24 | 19 |
| Designation of contents of record on appeal | 25 | 20 |
| Clerk's certificate (omitted in printing) | 27 | 20 |
| Proceedings in the United States Court of Appeals for the Fifth Circuit | | |
| Opinion, Cameron, J. | 29 | 21 |
| Dissenting opinion, Rives, C. J. | 53 | 39 |
| Judgment | 55 | 41 |
| Petition of the appellee for rehearing en banc | 65 | 42 |
| Supplement to brief in support of petition for rehearing en banc | 96 | 44 |
| Appendix—Letter dated May 9, 1959 from Wm. Buford Mitchell to Hon. William P. Rogers, Attorney General, et al. | 103 | 49 |
| Opinion denying petition for rehearing, per curiam | 107 | 52 |
| Dissenting notation, Rives, J. | 114 | 58 |
| Order denying rehearing | 115 | 58 |
| Clerk's certificate (omitted in printing) | 120 | 58 |
| Order allowing certiorari | 121 | 59 |

[fol. 1]

**IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION**

• • • •

**RICHARD ROE (BUFORD MALONE, JR.) AND UNITED STATES OF AMERICA, PETITIONERS**

**VS.**

**JOHN DOE (JAMES A. BOWDOIN, ET AL.)**

**REMOVAL PETITION—Filed May 18, 1959**

[fol. 2] Now come Buford Malone, Jr. and the United States of America, petitioners, by and through their attorneys, Frank O. Evans, United States Attorney, and Floyd M. Buford, Assistant United States Attorney for the Middle District of Georgia, and show the Court the following facts:

1.

On the 7th day of May, 1959, the above-entitled action was commenced in the Superior Court, Jasper County, Georgia, against your petitioners; said action being an ejectment suit and involves lands that were acquired by the United States of America by deed on June 6, 1936, and your petitioners aver that the United States of American since acquiring said land has lawfully owned and possessed the same.

2.

Before the commencement of this action and at all times hereinafter mentioned, petitioner Buford Malone, Jr. was a Forest Service Officer with the Forest Service, United States Department of Agriculture, and his official duties as a Forest Service Officer required him to be, and he was, in charge and in possession of the land described in said ejectment suit.

3.

At all times mentioned in said action, petitioner, Buford Malone, Jr., was acting solely under color of his office as a Forest Service Officer for the Forest [fol. 3] Service, United States Department of Agriculture, and all his acts in connection with the matters charged in said complaint were committed by him under color of his said office.

4.

A copy of the plaintiff's John Doe complaint, setting forth the claim for relief upon which this action was based, was first received by petitioner, Buford Malone, Jr., on May 9, 1959; the Sheriff of Jasper County having personally served a copy of the complaint on petitioner Malone on said date.

5.

Petitioner, United States of America, was served with copies of the complaint by mail; that is to say, counsel for the plaintiff mailed the Attorney General of the United States copies of the complaint on May 9, 1959; and the United States Attorney for the Middle District of Georgia, copies of the complaint on the same date, the United States Attorney for this district having received his copies on May 11, 1959.

6.

This petition is accompanied by a bond with good and sufficient surety, conditioned that your petitioner, Buford Malone, Jr., will pay all costs and disbursements incurred by reason of these removal proceedings, should it be determined that his action was not removable or was improperly removed.

[fol. 4]

7.

Petitioners file herewith a copy of all process, pleadings, and orders served upon them in this action.

Wherefore, petitioners pray that the said action may be removed from the Superior Court, Jasper County, Georgia, into this Court for trial and determination, as provided for by Title 28, Section 1442 of the United States Code.

This the 18th day of May, 1959.

FRANK O. EVANS
United States Attorney,

By /s/ FLOYD M. BUFORD,
(Floyd M. Buford)
Assistant U. S. Attorney.

Duly Sworn to by Floyd M. Buford and Buford Malone, Jr. (Jurats Omitted in Printing.)

[fol. 5] IN THE
SUPERIOR COURT OF JASPER COUNTY, GEORGIA

PETITION—Filed May 7, 1959

Georgia,
Jasper County.

To the Superior Court of said County:

The petition of John Doe shows that Richard Roe has damaged him in the sum of Twenty-five Thousand Dollars; that on January 1, 1953, James A. Bowdein, Mrs. [fol. 6] Sara Bowdoin Gardner, Mrs. Lorine Bowdoin Land, E. R. Bowdoin, George Bowdoin, Mrs. Clotie Harkins, Mrs. Dorothy Schoonover, Mrs. Martha Emanuel, Toland Barfield and Ridley Barfield demised to your petitioners for the term of 50 years from said date the following lands lying in said County, to-wit:

All that tract or parcel of land, situate lying and being in the 304th District of Jasper County, Georgia, contain-

ing one hundred nine (109) acres, more or less, and bounded North by the United States of America (formerly E. R. Roberts) East by United States of America (formerly Micheal M. Toland Estate); South by Juliette Milling Company, (formerly Charlotte Weatherbee) and West by Ocmulgee River;

and your petitioner duly entered thereon under said lease and afterwords on December 1, 1953, said Richard Roe forcibly ejected and ousted your petitioner from said lands and the possession thereof.

Wherefore your petitioner prays that process issue requiring said Richard Roe to be and appear at the next term of the Superior Court of said County to answer this complaint as provided by law.

W. B. MITCHELL.

W. B. Mitchell,
Attorney at Law,
Forsyth, Ga.

Filed in Office, this the 7th day of May, 1959.

C. B. POUND,
Clerk, Jasper Superior Court.

[fol. 7] IN THE
SUPERIOR COURT OF JASPER COUNTY, GEORGIA

PROCESS

Georgia,
Jasper County.

To the Sheriffs of the State of Georgia and Their Lawful Deputies:

EJECTMENT IN JASPER SUPERIOR COURT

JOHN DOE, EX DEM., James A. Bowdoin, Mrs. Sara Bowdoin Gardner, Mrs. Lorine Bowdoin Land, E. R. Bowdoin, George Bowdoin, Mrs. Clotie Harkins, Mrs. Dorothy Schoonover, Mrs. Martha Emanuel, Roland Barfield, Ridley Barfield,

VS.

RICHARD ROE, casual ejector and Buford Malone, United States of America

August Term, 1959

The defendants, Richard Roe (i.e. Buford Malone Jr. and the United States of America) are hereby required to be and appear at the next term of the Superior Court on the appearance day of this case to be held in and for said County on the Second Monday in August, 1959 (August 10th, 1959) to answer the complaint of John Doe in ejectment; else the Court will proceed as to justice shall appertain.

Witness the Honorable George S. Carpenter, Judge of said Court this the 7th day of May, 1959.

C. B. POUND,
Clerk Superior Court.

[fol. 8] NOTICE TO THE REAL DEFENDANTS

To: Buford Malone Jr. and United States of America:

This to notify you of the filing of the foregoing suit in ejectment. As I have acted as casual ejector only, you are notified to appear and defend the action.

RICHARD ROE.

---

ENTRY OF SERVICE

I, W. B. Mitchell, Attorney for Petitioner, do hereby certify that I have served the Defendant United States of America, by mailing three copies of the foregoing petition, process and notice to the Hon. William P. Rogers, United States Attorney-General, Justice Department Building, Washington, D. C., and three copies to the Hon. Frank O. Evans, United States Attorney, Middle District of Georgia, P. O. Building, Macon, Georgia, by sending same by Registered Mail as provided by law.

This the 9th day of May, 1959.

W. B. MITCHELL,
Petitioner's Attorney.

W. B. Mitchell,
Attorney at Law,
Forsyth, Georgia.

Filed May 18, 1959.

[fol. 9] IN THE
UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA

REMOVAL BOND—Filed May 18, 1959.

Georgia,
Bibb County. ss.
Superior Court of Jasper County, Macon Division,
M. D. Ga.

No. 7387

Civil Action No. 1584

JOHN DOE,

v.

RICHARD ROE

Know all men by these presents, that we, Buford Malone, Jr., one of the defendants in the above-styled action, as principal, and Jack D. Edwards, as surety, are held and firmly bound to John Doe in the sum of Two Hundred Fifty and no/100 Dollars ($250.00) lawful money of the United States of America, for the payment of which, well and truly to be made, we, and each of us, bind ourselves, our heirs, executors and administrators jointly and severally by this presents.

The condition of this obligation is such that:

Whereas, Buford Malone, Jr. has applied by petition to the United States District Court for the Middle District of Georgia, Macon Division, for the removal of a certain cause pending in the Superior Court of Jasper County, Georgia, wherein John Doe is plaintiff and Richard Roe is defendant, to the United States District Court for the Middle District of Georgia, Macon Division, for further proceedings on the grounds in said petition set forth:

[fol. 10] Now, therefore, if petitioner, Buford Malone, Jr., shall pay all costs and disbursements incurred by

reason of the removal proceedings if it should be determined that the cause was not removable or was improperly removed to the district Court, then this obligation shall be void; otherwise it shall remain in full force and effect.

In witness whereof, we, the principal and surety, have caused this instrument to be executed this 18th day of May, 1959.

/s/ Buford Malone, Jr.,
(Buford Malone, Jr.),
Principal,

/s/ Jack D. Edwards,
(Jack D. Edwards),
Surety.

Witnessed:

John P. Cowart,
Clerk, U. S. District Court,
Middle District of Georgia.

Filed May 18, 1959.

IN THE UNITED STATES DISTRICT COURT

Order Extending Time for Filing Defensive Pleadings—May 19, 1959

For good cause shown, and on motion of the United States Attorney, it is Considered, Ordered and Adjudged that the United States of America and Buford Malone, [fol. 11] Jr. have until July 1, 1959 to file defensive pleadings in this case.

This the 19th day of May, 1959.

/s/ T. Hoyt Davis,
(T. Hoyt Davis)
United States Judge.

Filed May 19, 1959.

## IN THE UNITED STATES DISTRICT COURT

MOTION TO DISMISS COMPLAINT—Filed June 24, 1959

Come now Frank O. Evans, United States Attorney, and Floyd M. Buford, Assistant United States Attorney, representing the defendants, United States of America and Buford Malone, Jr., and move that the Court dismiss the complaint filed in this proceeding for the following reasons:

(1)

The complaint fails to state a claim against the defendants upon which relief can be granted.

(2)

The Superior Court of Jasper County, Georgia, does not have jurisdiction over the defendant, United States of America, nor does said Court have jurisdiction over [fol. 12] the defendant, Buford Malone, Jr., in this case, since the proceeding is in substance and effect against the United States of America.

(3)

The United States of America has not consented to be sued or waived its immunity from suit and the complaint affirmatively shows that Buford Malone, Jr. is being sued as an agent and employee of the United States and as to him the suit is in substance and effect one against the United States; thus, the United States is an essential and indispensable party to the suit.

Wherefore, the defendants, United States of America and Buford Malone, Jr., pray that the complaint be dismissed and costs be taxed against the plaintiff.

FRANK O. EVANS,
United States Attorney,

By /s/ FLOYD M. BUFORD,
(Floyd M. Buford),
Assistant United States
Attorney.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing motion to dismiss on the Honorable W. B. Mitchell, counsel for plaintiff, by mailing a copy of the same to him at his post office address, to wit, Forsyth, Georgia.

[fol. 13] This the 24 day of June, 1959.

/s/ FLOYD M. BUFORD,
(FloydM. Buford),
Assistant U. S. Attorney.

Filed June 24, 1959.

IN THE UNITED STATES DISTRICT COURT

MOTION FOR MORE DEFINITE STATEMENT—
Filed June 24, 1959

Now come the defendants, Buford Malone, Jr., and the United States of America, by and through their undersigned counsel, after filing their motion to dismiss and expressly not waiving their contentions therein, and respectfully show that the complaint and claim of the plaintiffs herein, as appears from the allegations contained therein, are based on title and ownership of certain real estate and the plaintiffs are asserting that they have the right to possess the same and that the defendants are in possession of the same and are denying the plaintiffs the right of possession, the suit herein being one in the fictitious form of ejectment;

The plaintiffs describe the real estate that they are claiming ownership of in their complaint as follows:

All that tract or parcel of land, situate, lying and being in the 304th District of Jasper County, Georgia, containing one hundred nine (109) acres, more or less and [fol. 14] bounded North by the United States of America (formerly E. R. Roberts) East by United States of America

(formerly Micheal M. Toland Estate); South by Juliette Milling Company, (formerly Charlotte Weatherbee) and West by Ocmulgee River;

Defendants show that the complaint is so vague and ambiguous that they cannot reasonably be required to frame and file responsive pleadings thereto, and that in order for them to intelligently answer the complaint it is necessary and essential that they be furnished with a full, accurate, and detailed description of the real estate that the plaintiffs are claiming title to and the right to possession of, in the suit; and

Defendants show that the defendant, United States of America, owns several thousand acres of lands which are situated within the boundaries of the description alleged in the complaint, and the defendants, their agents and employees, have no way of knowing, and do not know, and the plaintiffs have failed to advise the defendants, of the specific real estate and the plaintiffs are claiming in this proceeding; and

Defendants show that many valuable improvements have been made on some of the land that is situated within the boundaries of the description set forth in the complaint, and the defendants do not know if such improvements or any part of them have been made on the property claimed by the plaintiffs; and if the defendants are not more fully advised of the specific property claimed by the plaintiffs, the defendants may and probably will be deprived of their rights of set off as provided for in Ga. Code Ann. 33-107; and

[fol. 15] Defendants show that in this suit the law requires the defendants to admit possession, lease, entry, and ouster (Ga. Code 33-111) and the filing of an answer by the defendants in this suit would be an admission on their part that they possessed all of the lands situated within the boundaries of the description set forth in the complaint when in truth and fact the defendants, their agents and employees, do not know whether the defendants are in possession of all the lands so described and defendants aver that it would be expensive and unreasonable for the defendants to have to survey all of the lands so described in the complaint in order to properly defend

this suit and such surveying would be time consuming and would delay a prompt disposition of this case; and,

Defendants show that this motion is not made for the purpose of delay, but earnestly believe that the description of the property as set forth in the complaint is not with sufficient definiteness to enable the defendants to properly prepare their answer and defense.

Wherefore, defendants move that plaintiffs be directed to make a more definite statement in their complaint in the particulars above mentioned.

FRANK O. EVANS,
United States Attorney,

By /s/ FLOYD M. BUFORD,
(Floyd M. Buford),
Assistant U. S. Attorney.

[fol. 16] AFFIDAVIT

Georgia,
Bibb County.

I, Floyd M. Buford, Assistant United States Attorney, have read the foregoing motion for more definite statement, and after being duly sworn, do hereby state that the facts and statements alleged therein are true and correct to the best of my knowledge and belief, that such facts and statements are based on information that deponent has obtained from the government files and agents.

This the 24th day of June, 1959.

/s/ FLOYD M. BUFORD,
(Floyd M. Buford).

Sworn to and subscribed before me, this 24 day of June, 1959.

/s/ BETTY M. JONES,
Deputy United States Clerk.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing motion for more definite statement on the Honorable W. B. Mitchell, counsel for the plaintiffs, by mailing a copy of the same to him at his post office address, to wit, Forsyth, Georgia.

This the 24th day of June, 1959.

/s/ FLOYD M. BUFORD,
(Floyd M. Buford),
Assistant U. S. Attorney.

Filed June 24, 1959.

[fol. 17] IN THE
UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME FOR FILING ANSWER—
June 24, 1959

It appearing to the Court that the defendants in the above-captioned case have filed their motions to dismiss and for a more definite statement, upon motion of the United States Attorney and for good cause shown,

It Is Ordered that the defendants do not have to file their answer in this case until the Court has ruled on said motion, at which time the Court will specify the time in which the defendants should file their answer.

This the 24th day of June, 1959.

T. HOYT DAVIS,
(T. Hoyt Davis),
United States Judge.

Filed Jun. 24, 1959.

IN THE UNITED STATES DISTRICT COURT

AMENDMENT BY PLAINTIFF—Filed Sept. 26, 1959

Comes now the plaintiff in the above stated case, and by leave of the Court first had and obtained, files this amendment in response to the Motion for More Definite Statement filed by the defendants and for amendment shows:

1.

Plaintiff amends said action by attaching hereto a copy of a plat of the one hundred and nine (109) acres of land claimed by plaintiffs.

[fol. 18] Wherefore, Plaintiff prays that this amendment be allowed.

/s/ W. B. MITCHELL,
Attorney for Plaintiff.

W. B. Mitchell,
Attorney at Law,
Forsyth, Georgia.

The foregoing amendment allowed subject to objection and demurrer, this the 26 day of September, 1959.

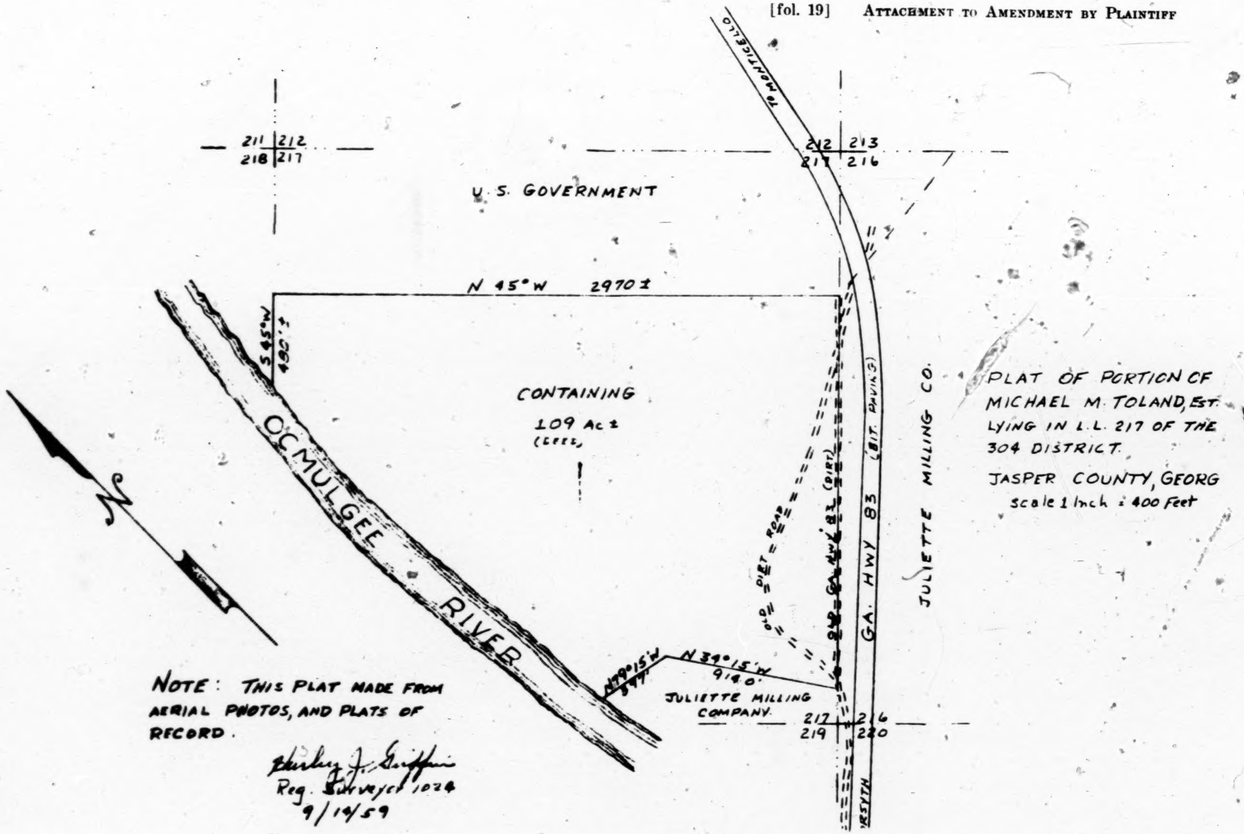
/s/ W. A. BOOTLE,
United States Judge.

Service of the foregoing amendment acknowledged this the 26 day of September, 1959.

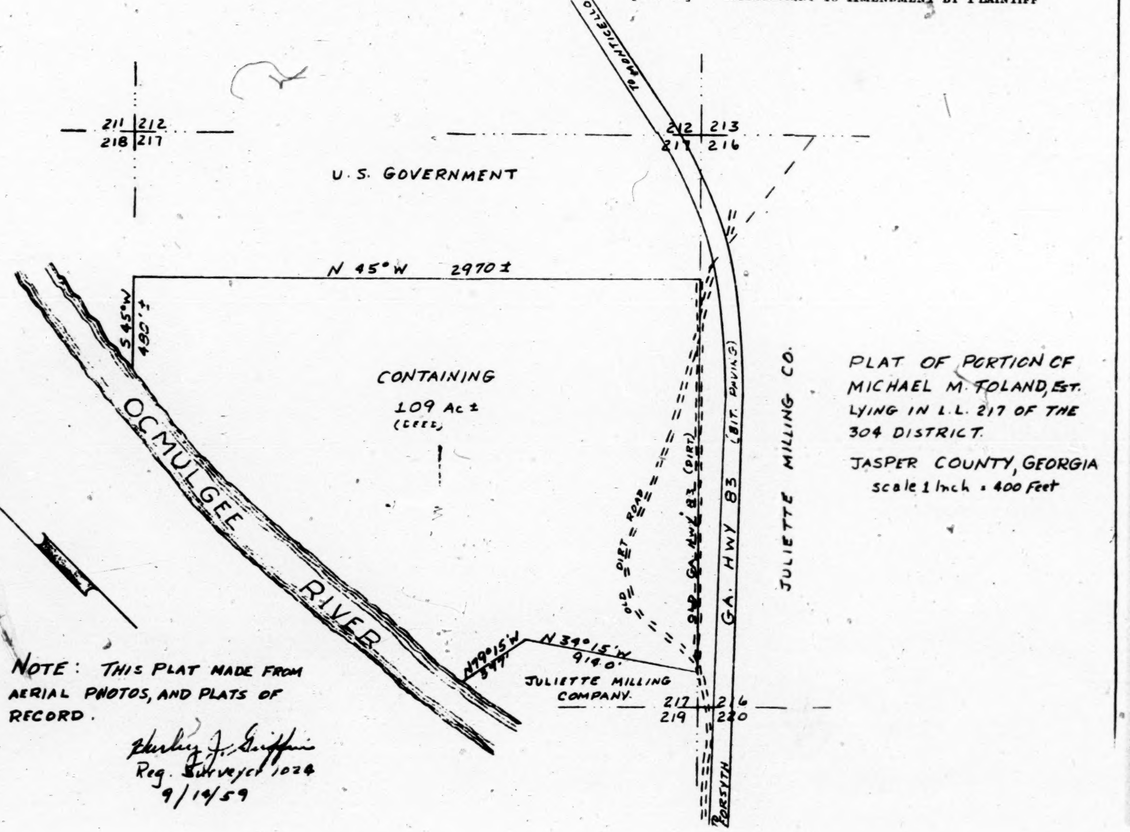
/s/ FLOYD M. BUFORD,
Attorney for Defendant.

Filed Sept. 26, 1959.

[fol. 19] ATTACHMENT TO AMENDMENT BY PLAINTIFF




[fol. 19] ATTACHMENT TO AMENDMENT BY PLAINTIFF



[fol. 20] IN THE
UNITED STATES DISTRICT COURT

OPINION GRANTING MOTION TO DISMISS—Dec. 29, 1959

Bootle, District Judge:

This suit in the fictitious form of ejectment was instituted in the Superior Court of Jasper County, Georgia, the real defendants being Buford Malone, Jr. and United States of America. It was thereafter removed into this Court upon petition of both defendants, which petition alleged in paragraphs 2 and 3 thereof as follows:

"2. Before the commencement of this action and at all times hereinafter mentioned, petitioner Buford Malone, Jr. was a Forest Service Officer with the Forest Service, United States Department of Agriculture, and his official duties as a Forest Service Officer required him to be, and he was, in charge and in possession of the land described in said ejectment suit.

"3. At all times mentioned in said action, petitioner, Buford Malone, Jr., was acting solely under color of his office as a Forest Service Officer for the Forest Service, United States Department of Agriculture, and all his acts in connection with the matters charged in said complaint were committed by him under color of his said office."

Thereafter, both defendants filed their motion to dismiss upon the grounds that the complaint fails to state a claim against the defendants upon which relief can be granted; that the Court has no jurisdiction over Malone since the proceeding is in substance and effect against the United States and that the United States has not [fol. 21] consented to be sued or waived its immunity from suit and "the complaint affirmatively shows that Buford Malone, Jr. is being sued as an agent and employee of the United States and as to him the suit is in substance and effect one against the United States; thus, the United States is an essential and indispensable party to the suit."

Counsel were heard at a pre-trial conference on October 2, 1959 and upon written briefs and upon an adjourned pre-trial conference held this day.

While the complaint does not affirmatively show that Malone is being sued as an agent and employee of the United States, counsel for the plaintiff admitted at the pre-trial conference today that the above-quoted paragraphs 2 and 3 of the removal petition are true and correct. It does now appear, therefore, that Malone does not purport to act in the premises as an individual but solely as an official or employee of the sovereign.

Relying upon the cases of United States v. Lee, 106 U. S. 196, 27 L. Ed. 171 (1882); Sawyer v. Osterhaus, 195 Fed. 655, 212 Fed. 765 (N. D. Cal 1912); and Land v. Dollar, 330 U. S. 731, 91 L. Ed. 1209 (1947), plaintiff claims the right to maintain this ejectment suit against Malone, notwithstanding the fact that Malone has acted and is acting in the premises solely under color of his office and employment. Plaintiff frankly concedes that he cannot maintain this action against the United States itself.

This Court finds itself in agreement with the following statement in the opinion of Judge Gilliam in the case of [fol. 22] Jones v. United States, 127 F. Supp. 31, 33 (E. D. N. C. 1954):

"However, in my opinion, United States v. Lee has been severely limited by Larson [Larson v. Domestic and Foreign Commerce Corp., 337 U. S. 682, 93 L. Ed. 1628 (194)9], and with the possibility of the landowner recovering just compensation for the wrongful taking, there may be no cases at all in which United States v. Lee will permit suit today."

The key to the possible distinction between Lee and Larson is contained in footnote 17 to Larson, pointing out that Lee was decided in 1882 before the enactment of the Tucker Act, which was enacted on March 3, 1887.

Under the Larson decision if it were contended that Malone were acting beyond a statutory limitation upon his power, it would be necessary for the complaint to set out the statutory limitation upon which plaintiff relies. 337 U. S. 682, 690. Not only is there no such allegation, but there is a solemn admission that his official duties as a forest service officer required him to be and that he was in charge and in possession of the land involved.

"The United States has not consented to be sued in the District Court of the United States in suits to try title to lands claimed by it where the plaintiff is not in possession and his claim of title is denied." Rambo v. United States, 145 F. 2d 670, 671 (5th Cir. 1945), cert. denied, 324 U. S. 848, 89 L. Ed. 1408 (1945).
[fol. 23] Accordingly, the defendants' motion to dismiss will be granted, and counsel for the defendants may prepare and submit an appropriate order

This 29 day of December, 1959.

/s/ W. A. Bootle,
United States Judge.

Filed Dec. 29, 1959.

• • • •

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA,
MACON DIVISION

Civil Action No. 1584

John Doe (James A. Bowdoin, et al.), plaintiff

v.

Richard Roe (Buford Malone, Jr. and United States of America), defendants

Judgment—Dec. 30, 1959

Pursuant to the opinion rendered by this Court in the above-styled case on December 29, 1959, the motion of the defendants to dismiss the complaint is sustained, and

It is Considered, Ordered and Adjudged that the above-entitled action be, and it hereby is, dismissed.

This 30th day of December, 1959.

/s/ W. A. Bootle,
United States Judge.

Filed Dec. 30, 1959.

[fol. 24] IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA,
MACON DIVISION

Civil Action No. 1584

JOHN DOE (James A. Bowdoin, et al.)

v.

RICHARD ROE (Buford Malone, Jr., and United States of America)

NOTICE OF APPEAL—Filed Jan. 26, 1960

Notice is hereby given that James A. Bowdoin, Mrs. Sara Bowdoin Gardner, Mrs. Lorine Bowdoin Land, E. R. Bowdoin, George Bowdoin, Mrs. Clotie Harkins, Mrs. Dorothy Schoonover, Mrs. Martha Emanuel, Toland Barfield, and Ridley Barfield, plaintiffs, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the order of the District Court dismissing the complaint, which order was entered the 30th day of December, 1959.

/s/ W. B. MITCHELL,
(Wm. Buford Mitchell),
Attorney for Appellants.

Forsyth, Georgia.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Notice of Appeal on the Hon. Frank O. Evans and the Hon. Floyd M. Buford, counsel for defendants, by mailing a copy of the same to them at their post office address, to wit, P. O. Bldg., Macon, Georgia. [fol. 25] This the 26th day of January, 1960.

/s/ W. B. MITCHELL,
(W. B. Mitchell),
Attorney for Appellants.

Forsyth, Georgia.

Filed Jan. 26, 1960.

IN THE UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Now come appellants in the above-stated cause, after having filed its notice of appeal on January 26, 1960, and do hereby designate the following portions of the record, proceedings and evidence to be contained in the record on appeal, such designated portions being as follows:

(1) The entire record in said case.

This designation is made pursuant to Rule 75, Rules of Civil Procedure.

/s/ W. B. MITCHELL,
(W. B. Mitchell),
Attorney for appellants.

[fol. 26] I do certify that I have this day served the defendants with a copy of the within designation of the record on appeal in the above case by mailing a copy of the same to the Hon. Frank O. Evans and the Hon. Floyd M. Buford, counsel for defendants, by mailing a copy of the same to them at their post office address, to wit, P. O. Building, Macon, Georgia.

This the 26th day of January, 1960.

/s/ W. B. MITCHELL,
(W. B. Mitchell),
Attorney for appellants.

Forsyth, Georgia.

Filed Jan. 26, 1960.

[fol. 27] CLERK'S CERTIFICATE OMITTED IN PRINTING

[fol. 28] • • • •

[fol. 29]

. . . .

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18222

JAMES A. BOWDOIN, ET AL., APPELLANTS

versus

BUFORD MALONE, JR., and UNITED STATES OF AMERICA, APPELLEES

Appeal from the United States District Court for the Middle District of Georgia

OPINION—October 25, 1960

Before RIVES, Chief Judge, and CAMERON and BROWN, Circuit Judges

CAMERON, Circuit Judge: Appellants James A. Bowdoin, et al filed an action in ejectment in a Georgia state court in the fictitious form of *John Doe* v. *Richard Roe*, [fol. 30] as provided by the statutes of Georgia.[1] Personal service was had upon appellee Buford Malone, Jr. by the sheriff of Jasper County, Georgia; service upon the United States was attempted by mailing copies of the petition to the Attorney General of the United States and to the United States Attorney, thus revealing that the "true claimants" were the appellees Buford Malone, Jr., and the United States of America.

The appellees removed the case to the United States District Court, where they moved to dismiss the com-

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[1] Vol. 12, Code of Georgia, Annotated, Title 33, § 111:

"*Consent Rule. Fictious forms in pleading.*—The consent rule in ejectment shall always be considered as filed, and admits lease, entry, and ouster. The fictitious forms in pleading in ejectment shall be sufficient. Cf. Horn v. Towson, S.Ct. Ga. 1926, 135 S.E. 487.

plaint for failure to state a claim upon which relief could be granted; because the state court did not have jurisdiction over the United States or Malone, and the United States had not consented to be sued or waived its immunity from suit; and because Malone was being sued "as an agent and employee of the United States, and, as to him, the suit is in substance and effect one against the United States; thus the United States is an essential and indispensable party to the suit." [2]

[fol. 31] The entire argument of both litigants assumes that the uncontroverted averments of the petition of the appellants are sufficient to require answer by the appellee Malone and to a trial, unless the court below properly

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[2] Neither in the motion nor in appellees' brief is it argued that the petition filed by appellant was in any way insufficient to bring the appellees within the scope and protection of the statutes of Georgia, some of which are quoted here:

12 Code of Georgia Annotated, Title 33, § 102: *"Plaintiff may recover on his prior possession, when.*—A plaintiff in ejectment may recover the premises in dispute, upon his prior possession alone, against one who subsequently acquires possession of the land by mere entry and without any lawful right whatever."

Ib. Title 33, § 104: *"Mesne profits, how recovered.*—The plaintiff in ejectment may add a count in his petition, and submit the evidence to the jury, and recover by way of damages all such sums of money to which he may be entitled by way of mesne profits, together with the premises in dispute."

Ib. Title 33, § 114: *"True claimant made defendant; effect of judgment.*—A plaintiff in ejectment may in all cases make the true claimant defendant by serving a copy of the pending action upon him, and the person so notified shall be bound by the judgment."

Ib. Title 33, § 120: *"Writ of possession; issuance; contents.*—When a verdict in ejectment shall be rendered in favor of the plaintiff, and a judgment entered thereon, the clerk of the superior court shall issue a writ of possession, in which the clerk shall incorporate a clause directing the sheriff to collect, by levy and sale of the defendant's property, all such sums of money shall have been awarded to such plaintiff in ejectment as mesne profits and costs."

Ib. Title 33, § 121: *"Against whom writ of possession may issue.*—The writ of possession shall not issue against third persons not known in the suit on which such writ of possession is founded, nor put in possession by, or claiming under or by virtue of any conveyance from the defendant in such suit."

granted his motion, as well as that of the United States, to dismiss because of want of jurisdiction. Both parties conceded in the trial court and before us that the United States was not legally before the Court and that the action against it should be dismissed. The sole question remaining, therefore, is whether this statutory action in ejectment states a claim against appellee Buford Malone, Jr., Forest Service Officer, United States Department of Agriculture, whose official duties required him to be, and who was in fact, in charge and possession of the land described in the ejectment action under color of his office representing the United States.

[fol. 32] The court below granted Malone's motion to dismiss on the ground "that the Court has no jurisdiction over Malone since the proceeding is in substance and effect against the United States and that the United States has not consented to be sued or waived its immunity from suit."[3]

It is manifest that the court below did not base its decision on what the District Court for the Eastern District of North Carolina *did* in the *Jones* case, but adopted only a portion of what the district court there *said*. The fact is that the *Jones* suit involved, not only ejectment, but partition of lands in which Jones claimed to own a two-thirds interest, which the United States had taken

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[3] The court's reasons were thus amplified in its written opinion: "This Court finds itself in agreement with the following statement in the opinion of Judge Gilliam in the case of Jones v. United States, 127 F. Supp. 31, 33 (E.D. N.C. 1954):

"'However, in my opinion, United States v. Lee has been severely limited by Larson [Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 93 L. Ed. 1628 (1949)], and with the possibility of the landowner recovering just compensation for the wrongful taking, there may be no cases at all in which United States v. Lee will permit suit today.'

"The key to the possible distinction between Lee and Larson is contained in footnote 17 to Larson, pointing out that Lee was decided in 1882 before the enactment of the Tucker Act, which was enacted on March 3, 1887. . . .

"Accordingly, the defendants' motion to dismiss will be granted, and counsel for the defendants may prepare and submit an appropriate order."

without paying compensation under the Fifth Amendment. It appears from the decision that Dennis, the agent in charge of the tract of land, did not move to dismiss and did not ask summary judgment. Only the United States filed such motions. The final paragraph of *Jones* (127 [fol. 33] F. Supp. 33) shows the action taken by the court in that case: "It does not clearly appear that this Court has no jurisdiction to entertain the case in any of its aspects, and the court, therefore, denies both motions of the United States to dismiss as upon summary judgment."

We will not, however, confine this opinion to differentiating the *Jones* case from the case before us, as the argument of appellees is patched upon the assumption that, if the *Lee* case has not been entirely overruled, "there may be no cases at all in which United States v. Lee will permit suit today,"—as was said in *Jones* and apparently adopted by the court below.

In comparing the case before us with decisions in other cases which will be discussed, and in determining whether the facts here come within the holding of *United States* v. *Lee*, 1882, 106 U.S. 196—much watered down under the opinion of the court below and the argument of appellee here—we must follow the general rule:[4] "'. . . that a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of fact which could be proved in support of his claim. . . . Under the Rules of Civil Procedure a case consists not in the pleadings, but the evidence, for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the plead-[fol. 34] ings.'" This makes it necessary that the salient portions of the petition be set out.[5]

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[4] Stated by us in Des Isles v. Evans, et al, 1952, 200 F.2d 614, 615-616.

[5] "The petition of John Doe [James A. Bowdoin, et al] shows that Richard Roe [Buford Malone, Jr.] has damaged him in the sum of Twenty-five Thousand Dollars; for that on January 1, 1953, James A. Bowdoin [and nine others] demised to your peti-

Under this petition and the statutes of Georgia above quoted it is apparent that appellant would be able to prove: That they were, on the crucial dates, the true owners of such title to the lands involved as would support the leasehold interest they sought to establish; that the United States did not own any title to the lands which would defeat appellant's claims; that appellee Malone was in wrongful possession of said lands as agent of a principal which did not have any claim thereto, and that he had ousted appellants of their rightful possession; and that, based upon said tortious acts of appellee Malone, appellants are entitled to money damages and the possession of the land during the claimed term of the leasehold.[6]

[fol. 35] It is manifest from the Georgia statutes quoted and referred to, as well as the decisions cited, that the common law action of ejectment in Georgia involves possession alone, that the only process issuable to the victor is a writ of possession, together with damages, and that "the writ of possession shall not issue against third persons not known in the suit on which such writ of possession is founded, . . ." The sole question pre-

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tioners for the term of 50 years from said date the following lands in said County, to-wit:

". . . and your petitioner duly entered thereon under said lease and afterwards on December 1, 1953, said Richard Roe forcibly ejected and ousted your petitioner from said lands and the possession thereof.

"Wherefore your petitioner prays that process issue requiring Richard Roe to be and appear at the next term of the Superior Court of said County to answer this complaint as provided by law."

[6] Kauffman v. Deese, S. Ct. Ga., 1949, 205 Ga. 841, 55 S.E.2d 358, and Vinson v. Cannon, S. Ct. Ga., 1957, 213 Ga. 339, 99 S.E.2d 106. In the latter decision the general rule is stated, at page 109 of 99 S.E.2d:

"Needless to say the fictitious forms of pleading in ejectment are still the law in this State, with defendant admitting the lease and entry of the plaintiff and his ouster by the defendant from the lands involved. Code § 33-111; Code Ann. Supp. § 24-3344. . . . The purpose of the action is to eject the defendant from possession of the land involved. . . ."

sented, therefore, is one of law: is appellee Malone, under the admitted facts, entitled to have the action against him dismissed solely on the ground that he is protected by the asserted sovereign immunity of the United States?

If the *Lee* case is still the law applicable to ejectment suits of this character, it is plain that the complaint before us states a claim upon which relief can be granted, and that the appellee Malone is not protected by any sovereign immunity of the United States which may be present in such circumstances. Indeed neither the court below nor appellee's counsel seem to question this statement. If they did, the *Lee* case would reject their argument entirely, because the facts of the *Lee* case and those of the present case are identical in their legal effect. A comprehensive look at the *Lee* case is indicated.[1]

The Arlington estate of General Robert E. Lee had, during The War Between The States, been seized for nonpayment of taxes. Under the jury's findings these [fol. 36] taxes had in fact been tendered by a friend, but the tax collector had interpreted his authority as permitting payment of the taxes only by the record owner. After the United States had seized the lands, it established a fort and cemetery thereon. The plaintiff, in whom title to the land vested if its seizure could not be justified, brought an action of ejectment against the agents of the government in possession of the estate. The trial court overruled the suggestion of the Attorney General of the United States that the trial court was without jurisdiction, based on the ground that the property was in the possession of the United States. The ejectment action was tried to a jury, which found against the government agents, deciding that the attempted proof did not establish title in the Government and that the agents' possession was not, therefore, legally justified. The Supreme Court affirmed, holding that the lower court was competent to decide the issues between the parties without the presence of the United States whose consent to be sued had been withheld.

A close reading of *Lee* reveals that, although some of the language of the opinion referred to taking prop-

[1] 106 U.S. 196.

erty without just compensation, its real basis was that the government agents were ordinary tort feasors, not immunized for their wrongful trespass upon the plaintiff's property by the fact that they claimed to be acting on behalf of the government. It was admitted that Kaufman, Strong, et al who were actually holding the land were doing so as agents in possession of the property [fol. 37] of the United States. A few excerpts from the exhaustive *Lee* opinion will suffice to epitomize its holdings:

> "This proposition [that the court can render no judgment for the plaintiff and against the defendants because they hold the property as officers and agents of the United States, and that the property was appropriated to lawful public uses] rests on the principal that the United States cannot be lawfully sued without its consent in any case, and that no action can be maintained against any individual without such consent, where the judgment must depend on the right of the United States to property held by such persons as officers or agents of the government. . . . [106 U.S. p. 204]
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> "On the other hand, while acceding to the general proposition that in no court can the United States be sued directly by original process as a defendant, there is abundant evidence in the decisions of this court that the doctrine, if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to the suit. . . . [ib. pp. 207-208]
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> "Under our system the *people*, . . . are the sovereign. . . . The citizen here knows no persons, however near to those in power, or however powerful [fol. 38] himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural

or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right. . . . [pp. 208-209.]

"The case before us is a suit against Strong and Kaufman as individuals, to recover possession of property. . . . in this case . . . , after a judicial inquiry had made it clear that the property belonged to plaintiff and not to the United States, we are still asked to forbid the court below to proceed further, and to reverse and set aside what it has done, and thus refuse to perform the duty of deciding suits properly brought before us by citizens of the United States. . . . [Ib. p. 210.]

"'. . . The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; . . . This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best-established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which [fol. 39] they would afford against him could his principal be joined in the suit.' . . . [Ib. p. 213.]

"This examination of the cases in this court establishes clearly this result: that the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it, . . . [Ib. pp. 215-216.]

"That the United States are not bound by a judgment to which they are not parties, and that no officer of the government can, by defending a suit against private persons, conclude the United States by the judgment, was sufficient to decide that case, and was all that was decided. . . . [Ib. p. 217.]

"It is to be presumed in favor of the jurisdiction of the court that the plaintiff may be able to prove the right which he asserts in his declaration.

"What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery. . . . [Ib. p. 219.]

[fol. 40] "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. . . . [Ib. p. 220.]

"It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, Stop here, I hold by order of the President, and the progress of justice must be stayed. That, though the nature of the controversy is one peculiarly appropriate to the judicial function, though the United States is no party to the suit, . . . the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen. . . . [Ib. p. 221.]

"Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the govern-

ment, . . . the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion [fol. 41] of its rights. *Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff, and the present plaintiff as defendant, the title of the United States could be judicially determined.* . . . [Emphasis supplied—Ib. pp. 222.]

"The Circuit Court was competent to decide the issues in this case between the parties that were before it; in the principles on which these issues were decided no error has been found; and its judgment is Affirmed."

From these excerpts it is clear that the *Lee* case went considerably farther than the court below was asked to go in this case. Admitting that the United States was not properly made a party and that it would not be bound by the judgment,—a principal established also by Georgia Statutes in Footnote 2 *supra*—appellants sought, by a proper judicial proceeding, merely to have interlopers put off of their land by an action at law in ejectment. If *Lee* has any vitality at all, the judgment of the court below must be reversed.

And what of *Lee*? Has it ever been overruled by the Supreme Court? The court below did not so hold and appellee's argument does not directly make such a contention. All the court below said was, quoting from a six year old district court decision, that *Lee* "has been [fol. 42] severely limited by Larson, and with the possibility of the landowner recovering just compensation for the wrongful taking, there may be no cases at all in which United States v. Lee will permit suit today." A study of the cases decided both before and after the one the court below quoted from will demonstrate that the latter portion of the quoted statement is entirely without foundation.

Examination of Shepard's United States Citations reveals that the *Lee* case has been cited three hundred ninety-six times. It has appeared in decisions of the Supreme Court fifty-eight times in seven of which it has been "distinguished," and in four "explained." It would seem from this that the editors of Shepard's consider that, in the remaining forty-seven cases, no fault has been found with *Lee*. It should be noted in passing that, where the Supreme Court has "distinguished" the *Lee* case, it has compared it with the case then before the court and has decided that *Lee* was inapplicable, because its facts did not control those of the case under consideration. With respect to the quoted statement of the court below that the possible distinction between *Lee* and *Larson* was that *Lee* was decided in 1882 before the enactment of the Tucker Act in 1887, it should be noted that fifty of the fifty-eight Supreme Court decisions referred to *supra* have been decided since March 3, 1887 and also that this contention was specifically rejected in *Dollar*, *infra*.

[fol. 43] Probably the most significant point about this phase of the argument is that nobody has suggested that there is any authoritative holding that the *Lee* case does not now cover ejectment suits just as fully as it did the day of its rendition. The argument that its application has been severely limited has arisen when the principles of *Lee* was sought to be applied to other and often quite different situations, governed by entirely different rules of law. A reading of those cases will reveal also that there have been no clear-cut distinctions between the facts to which *Lee's* principles apply and those to which it does not apply—no blacks and whites, only varying shades of gray.

Mr. Justice Frankfurter, in his dissent in the *Larson* case,[8] has done a masterful job of analyzing a large number of the cases dealing with the principles of Lee and assigning them to categories and sub-categories in an effort to draw the line as distinctly as varying facts will permit. Starting with the statement (P. 706): "There is,

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[8] 337 U.S. 705-732.

however, an attendant weakness to a system that purports to pass merely on what are deemed to be the particularly circumstances of a case. Consciously or unconsciously the pronouncements in an opinion too often exceed the justification of the circumstances on which they are based, or, contrariwise, judicial preoccupation with the claims of the immediate leads to a succession of *ad hoc* determinations making for eventual confusion and conflict," he asserts that some of the confusion "is doubt-[fol. 44] less due to the fact that a steady change of opinion has gradually undermined unquestioned acceptance of the sovereign's freedom from ordinary legal responsibility. . . . In the course of a century or more a steadily expanding conception of public morality regarding 'governmental responsibility' has led to a 'generous policy of consent for suits against the government' to compensate for the negligence of its agents as well as to secure obedience to its contracts." [Pp. 708-709.] And, as further support of his statement, he cites the speed with which the Eleventh Amendment was passed after the Supreme Court's decision in *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), along with the cases of *New Hampshire* v. *Louisiana*, 108 U.S. 76, 86-88; *Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 396, and *Federal Housing Administration* v. *Burr*, 309 U.S. 242, 245, where the Supreme Court held that the doctrine of sovereign immunity was in disfavor, as well as Borchard's bibliography in 20 A. B. A. J. 747, 748, and the materials in Judge Mack's opinion in *The Pesaro*, 277 F. 473, reversed, 271 U.S. 562. To these might be added the several Acts in which Congress has specifically withdrawn sovereign immunity, such as the Federal Tort Claims Act, 28 U.S.C.A. § 2671, et seq., Federal Old Age, Survivors and Disability Insurance Benefits Act, 42 U.S.C.A. § 405(g), and I.R.C. 1954, § 7422, et seq.

We will not attempt a general discussion of the cases, referring instead to Mr. Justice Frankfurter's dissent *supra* as presenting a fair and exhaustive examination of the leading cases.

[fol. 45] The court below cites in its opinion as authority for the judgment rendered, a case from this Court, *Rambo* v. *United States*, 145 F.2d 670, 671 (1945), certiorari

denied, 324 U.S. 848, 89 L. Ed. 1408 (1945). It quotes from that decision this sentence: "The United States has not consented to be sued in the District Court of the United States in suits to try title to lands claimed by it where the plaintiff is not in possession and his claim of title is denied." It is sufficient to answer that the case before us is not such a case as the court below there described. This is not a suit to try title to land. True, plaintiffs must show title in themselves as the basis for their possessory action, but the judgment sought does not involve title to land at all. This is purely a common law action in ejectment, as recognized and defined by Georgia's statutes, and involves merely a dispute between individuals for possession of the land.

The main reliance of the court below was the *Larson* case, as is the argument of appellees here. Before taking up discussion of that case we ought to consider the decision of the Supreme Court two years earlier in *Land, Chairman, United States Maritime Comm. et al* v. *Dollar, et al*, 1947, 330 U.S. 731.

*Dollar* was a case where members of the United States Maritime Commission had physical control of the property in question, but it was claimed by Dollar that the property was wrongfully withheld. The Supreme Court approved the principle that the trial court had authority to proceed on the merits in order to determine whether [fol. 46] the plaintiff's claim that the withholding of the pledged property was, under the circumstances, tortious and therefore subject to relief against the agents as individuals. The court specifically applied the principles of *Lee* as they are reinforced by such cases as *Sloan Shipyards Corp.* v. *United States Fleet Corp.*, 1922, 258 U.S. 549; *Goltra* v. *Weeks*, 1926, 271 U.S. 536, and *Ickes* v. *Fox*, 1937, 300 U.S. 82. Mr. Justice Douglas, speaking for an unanimous court (Mr. Justice Black not participating), stated:

> "Where the right to possession or enjoyment of property under general law is in issue, and the defendants claim as officers or agents of the sovereign, the rule of United States v. Lee supra has been repeatedly approved. [Eight Supreme Court cases

cited.] . . . In United States v. Lee supra record title of the land was in the United States and its officers were in possession. The force of the decree in that case was to grant possession to the private claimant. Though the judgment was not res judicata against the United States, page 222, it settled as between the parties the controversy over possession. . . .

"We do not trace the principles of United States v. Lee supra, in its various ramifications. Cases on which petitioners rely are distinguishable. This is not an indirect attempt to collect a debt from the United States by preventing action of government officials which would alter or terminate the contractual obligation of the United States to pay money. . . . It is not an attempt to get specific performance of a [fol. 47] contract to deliver property of the United States . . . It is not a case where the sovereign admittedly had title to property and is sued by those who seek to compel a conveyance or to enjoin disposition of the property, the adverse claims being based on an allegedly superior equity or on rights arising under Act of Congress. . . .

". . . But the rule is based on practical considerations reflected in the policy which forbids suits against the sovereign without its consent. The 'essential nature and effect of the proceeding may be such as to make plain that the judgment sought would expend itself on the public treasury or domain or interfere with the public administration . . . But public officials may become tort feasors by exceeding the limits of their authority. *And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the court of claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld.*

"It is in the latter category that the pleadings have cast this case. That is to say, if the allega-

tions of the petition are true, the shares of stock never were the property of the United States and are being wrongfully withheld by petitioners who acted in excess of their authority as public officers. If ownership of the shares is in the United States, [fol. 48] suit to recover them would of course be a suit against the United States. But if it is decided on the merits either that the contract was illegal or that respondents are pledgors, they are entitled to possession of the shares as against the petitioners, though, as we have said, the judgment would not be res judicata as against the United States. . ."[9] [Emphasis added.]

In considering *Larson*, let it be understood that the opinion had the unconditional concurrence of only a minority of the Supreme Court, to-wit, Chief Justice Vinson and Justices Black, Reed and Murphy, all of whom, except Justice Black, had concurred in *Dollar*. Mr. Justice Douglas, author of *Dollar*, joined in the opinion only because the case involved the minutiae of the intricate machinery of sales by the world's largest merchant.[10] Mr. Justice Rutledge concurred in the result, while Justices Frankfurter, Jackson and Burton dissented, the dissenting opinion of Justice Frankfurter having been above referred to several times.

The majority opinion in *Larson* is susceptible of being construed as questioning some of the fundamental bases of *Lee*. As Mr. Justice Frankfurter points out,[11] to [fol. 49] ascribe to *Lee* the effect which some of the language of *Larson* would seem to justify would be to over-

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[9] 330 U.S. pp. 737-739.

[10] His concurrence states: "I think the principles announced by the Court are the ones which should govern the selling of government property. Less strict application of those principles *would cause intolerable interference with public administration.* To make the right to sue the officer turn on whether by the law of sales title had passed to the buyer *would clog this governmental function with intolerable burdens.* So I have joined the Court's opinion." [Emphasis added.]

[11] 337 U.S. at pp. 718-720 et seq.

rule, not only *Lee*, but many other Supreme Court cases, including landmark decisions by Mr. Justice Holmes, *Sloan Shipyards Corp.* v. *United States*, 1922, 258 U.S. 549, 567-568, and Chief Justice Taft, *Goltra* v. *Weeks*, 271 U.S. 536. The dissent quotes from the decision of Mr. Justice Holmes:

> "The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name. It is not impossible that the Fleet Corporation purported to act under the contract giving it the right to take possession in certain events, but that the plaintiffs can show that the events had not occurred." [337 U.S. pp. 719-720.]

*Larson* is a suit for injunction and declaratory judgment against the head of the War Assets Administration upon which a restraining order was issued ex parte. The opinion stresses (page 686): "Nor was it claimed that the Administrator had any personal interest in this coal or, indeed, that he himself had taken any wrongful action." Injunctive relief was sought against the Administration for wrongs allegedly committed by its subordinate officials. The crucial paragraph in the *Larson* decision, the one [fol. 50] which differentiates that case from the one before the Court below and which supports our holding here is this:

> "Before answering that question it is perhaps advisable to state clearly what is and what is not involved. *There is not involved any question of the immunization of government officers against responsibility for their wrongful actions.* If those actions are such as to create a personal liability, whether sounding in tort or in contract, the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit against him." 337 U.S. 686. [Emphasis added.]

The emphasized words describe exactly what is involved in this action. Appellants claim that appellee Malone is wrongfully and tortiously holding possession of their lands as agent for the United States, which does not have the right of such possession. We think that this is a valid and basic differentiation between *Larson* and this case.

We think it is significant also that the Supreme Court did not overrule *Lee* or *Dollar*, essaying merely to distinguish those cases from the *Larson* case. The special concurring opinion of Mr. Justice Douglas helps to clarify the scope and content of the differentiation. The fact that three Justices who, a scant two years before, had concurred in *Dollar*, also concurred in *Larson* carries a strong inference, we think, that they were not subscribing at all to a doctrine which would, in such a basic aspect, cut the ground from under *Dollar* and *Lee*. At all events, [fol. 51] whatever language of *Larson* seems to conflict with *Lee* and *Dollar* is explainable under this pungent paragraph in Mr. Justice Frankfurter's dissent:[12]

> "These cases likewise apply a principle that is clear. There is an appearance of inconsistency in some of the cases only because opinions also are prey to the frailties of composition. Familiar phrases are not always used with critical precision or with due relevance to the circumstances of a particular case."

It is worthy of note also that, since *Larson*, *Lee* has been cited with approval in the concurring opinion of Mr. Justice Frankfurter, *Joint Anti-Fascist Refugee Committee* v. *McGrath, Attorney General, et al*, 1951, 341 U.S. 123, 152; and also by him, speaking for an unanimous court,[13] in *Leiter Minerals, Inc.* v. *United States*, 1957, 352 U.S. 220, 226. *Dollar* has, since *Larson*, been cited with approval in the concurring opinion of Mr.

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[12] 337 U.S. 713.

[13] Mr. Justice Douglas dissented in part, 352 U.S. 230, but he concurred in the portion of the opinion in respect to which *Lee* was cited.

Justice Douglas in *Georgia Railroad and Banking Co.* v. *Redwine, Etc.*, 1952, 342 U.S. 299, 307. Neither *Lee* nor *Dollar* has been questioned by the Supreme Court in any subsequent opinion, as far as our search has revealed.

*Larson* has been quoted in the opinion of the Court by Mr. Justice Burton in *Anti-Fascist Committee* v. *McGrath supra* at page 140 as follows: "The respondents [fol. 52] are not immune from such a proceeding. Only recently, this Court recognized that 'the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so "illegal" as to permit a suit for specific relief against the officer as an individual . . . if it is not within the officer's statutory powers or, if within those powers . . . if the powers, or their exercise in the particular case, are constitutionally void.'"

Mr. Justice Frankfurter, dissenting in *Snyder* v. *Buck, Paymaster*, 1950, 340 U.S. 15, 29, cited his dissent in *Larson* and added further remarks concerning the increasing disrepute of the doctrine of sovereign immunity.[14]

In summary, it is clear that, however broad the apparent sweep of the limitations placed upon *Lee* by some of the courts may be, the Supreme Court has never questioned its controlling validity in possessory actions

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[14] "In scores of cases this Court has had to consider when a suit, though nominally against one holding public office, is in fact a suit against the Government and as such barred by want of the sovereign's consent to be sued. See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, App. 729. The subject, it has been recognized, is not free from casuistry because of the natural, even if unconscious, pressure to escape from the doctrine of sovereign immunity which—whatever its historic basis—is hardly a doctrine based upon moral considerations. The trend of deep sentiment, reflected by legislation and adjudication, has looked askance at the doctrine. See Keifer & Keifer v. R. F. C., 306 U.S. 381, 390-392. If astuteness has been exercised to deny the representative character of an official in order to avoid his identification as the sovereign *ad hoc*, it runs counter to the rational administration of justice not to find an official the sovereign *ad hoc* and the suit against him, in effect, a suit against the sovereign when sovereign immunity is not circumscribed thereby."

[fol. 53] like ejectment, seeking to oust the government's agents from wrongful possession growing out of their tortious or illegal acts. That is all this case involves. The unanimity with which the principles here approved have been upheld springs, doubtless, from the conviction that the implied immunity of the government itself should be extended to its agents only with great caution; and from the realization that the government, in such a suit as this, has the simple option of filing a counterclaim aimed at quieting its challenged title or of raising the same issues in an independent proceeding.

We hold that the action against appellee Malone is not foreclosed because he possesses the land as agent for the government; and the judgment of the court below is reversed and the case is remanded for further and not inconsistent proceeding.

REVERSED AND REMANDED.

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RIVES, Chief Judge, Dissenting:

The district court's clear and able opinion reported in . . . . F.Supp. . . . . shows that ". . . counsel for the plaintiff admitted at the pre-trial conference today that the above quoted paragraphs 2 and 3 of the removal petition are true and correct."[1] From that admission, [fol. 54] the district court correctly concluded: "It does now appear, therefore, that Malone does not purport to

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[1] Those paragraphs read as follows:

"2. Before the commencement of this action and at all times hereinafter mentioned, petitioner Muford Malone, Jr. was a Forest Service Officer with the Forest Service, United States Department of Agriculture, and his official duties as a Forest Service Officer required him to be, and he was, in charge and in possession of the land described in said ejectment suit.

"3. At all times mentioned in said action, petitioner, Buford Malone, Jr., was acting solely under color of his office as a Forest Service Officer for the Forest Service, United States Department of Agriculture, and all his acts in connection with the matters charged in said complaint were committed by him under color of his said office."

act in the premises as an individual but solely as an official or employee of the sovereign."[2] The appellants make no denial of any of these admissions of fact upon which the district court's opinion and judgment were based.

Malone might not be immunized from personal liability in damages, but a writ to oust Malone from the possession which he holds solely on behalf of the United States would interfere with governmental functions. It seems to me that the full discussion in *Larson* v. *Domestic and Foreign Corp.*, 1949, 337 U.S. 682, demonstrates that this action was properly dismissed as a suit against the United States to which it had not consented. See also, *Georgia R. Co.* v. *Redwine*, 1952, 342 U.S. 299, 304; *Leiter Minerals, Inc.* v. *United States*, 1957, 352 U.S. 220, 226; *Stewart* v. *United States*, 5 Cir., 1957, 242 F.2d 49, 51; Hart and Wechsler, The Federal Courts and the Federal System, pp. 1169-1180. I respectfully dissent.

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[2] Later in the opinion, the district court said:

"Under the Larson decision if it were contended that Malone were acting beyond a statutory limitation upon his power, it would be necessary for the complaint to set out the statutory limitation upon which plaintiff relies. 337 U.S. 682, 690. Not only is there no such allegation, but *there is a solemn admission that his official duties as a forest service officer required him to be and that he was in charge and in possession of the land involved.*" (Emphasis supplied.)

[fol. 55]

• • • •

No. 18222

JAMES A. BOWDOIN, ET AL,

versus

BUFORD MALONE, JR., and UNITED STATES OF AMERICA

JUDGMENT—October 25, 1960

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings.

"Rives, Chief Judge, Dissenting."

[fols. 56-64] • • • •

[fol. 65] IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18,222

JAMES A. BOWDOIN, ET AL., APPELLANTS

v.

BUFORD MALONE, JR., APPELLEE

Appeal from the United States District Court for the Middle District of Georgia

PETITION OF THE APPELLEE FOR REHEARING EN BANC—
Filed Dec. 20, 1960

Buford Malone, Jr., as Forest Service Officer, Department of Agriculture, appellee, by the undersigned attorneys of the Department of Justice, presents this petition for a rehearing and requests that such hearing be had *en banc*, and in support thereof respectfully shows:

The appellants instituted this ejectment proceeding in a court of the State of Georgia. During the pre-trial conference in the federal district court to which the action was removed, the appellants admitted that the action cannot be maintained against the United States itself and that Malone is acting solely under color of his [fol. 66] office and not as an individual. Based upon these admissions and the appellants' failure to allege that Malone is acting beyond constitutional or statutory authority, the district court dismissed the complaint for want of jurisdiction.

Upon appeal, the appellee contended that an action to eject a federal officer from land to which the United States claims title is a suit against the United States over which the court has no jurisdiction in the absence of consent. The appellee also maintained that dismissal was proper because the appellants do not allege that the federal officer is acting individually, rather than for the sovereign, or beyond constitutional or statutory authority. This Court held, Chief Judge Rives dissent-

ing, that this action could be maintained against the federal officer.

The majority decision rejecting this argument should be reheard by the full bench of this Court because:

1. Important principles are involved and many cases within this Circuit wherein the title of the United States is sought to be challenged will be controlled at the trial court level by this opinion.

2. The majority opinion regresses in effect to the discredited view that whether a suit is against the United States is determined by its presence as a formal party.

3. The majority opinion is in conflict with decisions of the Supreme Court, this Circuit, and other circuits. [fol. 67] 4. The majority opinion is based upon an erroneous premise as to Georgia law.

For these reasons, elaborated in the accompanying brief, the appellee now petitions for a rehearing *en banc.*

Respectfully,

PERRY W. MORTON,
*Assistant Attorney General.*

FRANK O. EVANS,
*United States Attorney,*
*Macon, Georgia.*

FLOYD M. BUFORD,
*Assistant United States Attorney,*
*Macon, Georgia.*

ROGER P. MARQUIS,
/s/ Raymond N. Zagone.
RAYMOND N. ZAGONE,
*Attorneys,*
*Department of Justice,*
*Washington 25, D. C.*

DECEMBER 1960

[fols. 68-95] • • • •

[fol. 96] IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18,222

JAMES A. BOWDOIN, ET AL., APPELLANTS

v.

BUFORD MALONE, JR., APPELLEE

Appeal from the United States District Court for the Middle District of Georgia

SUPPLEMENT TO BRIEF IN SUPPORT OF THE APPELLEE'S PETITION FOR REHEARING EN BANC—Filed Jan. 4, 1961

Continuing research in the Department files in this case and others has yielded highly material information which was not available at the time the appellee's Petition for Rehearing *En Banc* and Brief in Support were submitted. Because of the information's relevance, this supplement, presenting an additional reason for rehearing *en banc*, is filed.

[fol. 97] V

*The Remedy Available to the Appellants to Establish Their Claim to Title Expired in 1942, and, Hence, Torturing the Doctrine of Sovereign Immunity to Give the Appellants Another Remedy Is Not Justified*

The basis of the appellants' claim does not appear upon the face of the complaint itself only because the complaint follows the fictitious form of ejectment pleading. (R. 5). But the bases of both the appellants' and the United States' claims to title are before this Court. The United States acquired the lands involved by deed dated June 6, 1936, and has been in possession since that time (R. 2). The appellants base their claim upon a will executed and recorded over 100 years ago in 1857 (Br. 3). Reference is made in the appellants' brief to

their having apprised the appellee and the United States of their "contentions of ownership" (Br. 3). The appellants' letter, accompanying their complaint and setting forth their contentions, is printed as an appendix to this supplement.

It thus appears that the testator in 1857 devised a life estate in certain land to one of his daughters, Martha A. Sanders (*nee* Toland), with remainder over to her children. The appellants are said to be her children and grandchildren. In 1873, the devisee conveyed the land, evidently in fee, to mesne grantors of the United States. The appellants are not averred to have ever been in actual possession.

It is obvious, therefore, that the appellants are asserting a stale claim and that their action would founder even under the Georgia seven-year or twenty-year pre-
[fol. 98] scription statutes, 24 Ga. Code Ann. (1955 revision) secs. 85-406 and 85-407, as against the 1936 deed upon which the United States bases its claim, not to mention the many years when suit could have been brought against the Government's predecessors in title.[1] And it cannot be maintained that the doctrine of sovereign immunity at all times precluded the appellants from having their interests adjudicated, even as against the United States. For Congress provided the appellants with a reasonable remedy in the Tucker Act, 28 U.S.C. secs. 1346(a) and 1491, where Congress waived the sovereign's immunity for the assertion of such claims. But in so doing, Congress imposed conditions upon that waiver, which is clearly within its power. One condition, especially applicable here, is that the claim be asserted within six years after the right of action first accrues. 28 U.S.C. sec. 2401(a).

To be noted in this connection is the majority's observation of the many instances "in which Congress has

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[1] It is interesting to note that the opinion of the trial court in the *Lee* case recites that the plaintiff there commenced his ejectment action within the period of Virginia limitations, which is an additional difference between that case and the one presented by the appellants. *Lee* v. *Kaufman*, 15 Fed. Cas. No. 8,191 at 163 (C.C. E.D. Va. 1879).

specifically withdrawn sovereign immunity * * *" (slip opinion, p. 16). Indeed, this is so, but it must also be observed that the waivers have not been without significant qualifications and pursuant to a consistent congressional policy. As just discussed, Congress in the Tucker Act waived the sovereign's immunity for only six years [fol. 99] from the date the right of action first accrues. 28 U.S.C. sec. 2401(a). Another example is the Federal Tort Claims Act, 28 U.S.C. secs. 1346(b) and 2671, *et seq.*, where Congress, in addition to imposing a limitation period for the assertion of tort claims, excepted a large number of claims, including actions based upon the exercise by federal officers of discretionary functions. 28 U.S.C. secs. 2401(b) and 2680. More important here than the conditions Congress has imposed in such statutes is the mode of relief Congress has authorized—relief in the form of *damages* for claims seasonably asserted. The usual relief afforded by Congress in raising the bar of immunity has not been in the form of specific relief, except in certain private acts. This was recognized by the Supreme Court in the *Larson* case, 330 U.S. at pp. 703-705, in the statement (at pp. 703-704):

> It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits to be maintained against the sovereign and we should give hospitable scope to that trend. But the reasoning is not applicable to suits for specific relief. For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for [fol. 100] the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its

> tracks by any plaintiff who presents a disputed question of property or contract right. * * *.[2]

It is not only the community as a whole as represented by the Government which benefits from these "strongest reasons of public policy," and from the restrictions imposed upon consents to suits against the sovereign. The courts themselves are thereby protected from a flood of litigation. But even with such conditions, stale claims, like the appellants', continue to be urged upon the courts. In *Andrews* v. *White*, 221 F.2d 790 (C.A. 6, 1955), affirming 121 F.Supp. 570 (E.D. Tenn. 1954), for example, the record discloses not only that none of the claimants there had ever been in actual possession of the land or had even been upon the land for more than 35 years, but also that taxes had not been assessed or paid for more than [fol. 101] 20 years prior to bringing the suit. In *Young* v. *Anderson*, 160 F.2d 225 (C.A. D.C. 1947), cert. den. 331 U.S. 824, reh. den. 331 U.S. 868, the opinion itself shows that the claim was grounded upon transactions occurring more than 10 years prior to suit. Similarly, in *Stewart* v. *United States*, 242 F.2d 49 (C.A. 5, 1957), the United States' acquisition of land by condemnation proceedings concluded 10 years prior to suit was questioned, as shown by the record in that case. The appellants' claim here is in this general category of dormant claims, which is barred by Georgia prescription statutes as well as by the conditions placed upon the reasonable remedy Congress afforded in relaxing the sovereign's immunity.

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[2] The relief sought in the present action—possession—is thus the very thing that produces interference with government activity. Until the time limit ran, the Tucker Act gave to appellants as complete a remedy as they were entitled to because, if the government agency concerned did not desire to keep the land if it were held that the Government did not have title, that fact could have been made known in partial defense of the Tucker Act case, since, absent express indication of intent by authorized government officers, it would have been somewhat doubtful whether the taking was temporary or permanent. See *United States* v. *Causby*, 328 U.S. 256 (1946). On the other hand, if permanent retention of the land was needed for governmental purposes, there would then have been a taking of fee title.

Moreover, related to the enlightened view of sovereign immunity, is the Government's willingness to bring its own actions to quiet titles to lands owned by it where substantial, reasonable, and active claims may be asserted by private citizens. See, e.g., *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220 (1957); *United States* v. *Patterson*, 206 F.2d 345 (C.A. 5, 1953).

[fol. 102] Hence, it cannot be seriously asserted that the sovereign's position in these matters has been medieval, nor that the appellants here were always without a remedy. These facts emphasize the correctness of application here of the doctrine of sovereign immunity.

Respectfully,

/s/ Perry W. Morton
PERRY W. MORTON,
*Assistant Attorney General.*

FRANK O. EVANS,
*United States Attorney,*
*Macon, Georgia.*

FLOYD M. BUFORD,
*Assistant United States Attorney,*
*Macon, Georgia.*

/s/ Roger P. Marquis
ROGER P. MARQUIS,
RAYMOND N. ZAGONE,
*Attorneys, Department of Justice,*
*Washington 25, D. C.*

DECEMBER 1960

[fol. 103] APPENDIX TO SUPPLEMENT

WM. BUFORD MITCHELL
Attorney at Law
Forsyth, Ga.

May 9, 1959

Hon. William P. Rogers,
Attorney-General,
Justice Department,
Washington, D. C.

Hon. Frank O. Evans,
United States Attorney,
Middle District of Georgia,
Post Office Building,
Macon, Georgia.

Gentlemen:

I have filed an ejectment in Jasper Superior Court, Monticello, Georgia, a county within the jurisdiction of the Middle District of Georgia, Macon Division, of the United States of America to recover 109 acres of land. This suit is under the Georgia Law known as the fictitious form of ejectment and have had or will serve Mr. Buford Malone, Jr., of Jasper County as on tenant in possession. Mr. Malone is the agent of the Interior [sic] Department in charge of said land and is a necessary party to the case. I herewith serve the United States of America with process by sending each of you two gentlemen three copies each of the petition, process and notice by registered mail.

I herewith present to you our contentions that the land belongs to my clients upon the following grounds:

Will of Michael M. Toland, recorded in Will Book 14, page 116 on August 7, 1857, Item 4 reading as follows:

[fol. 104] 4th. I will and bequeath unto my youngest children, to-wit: Those by my last wife namely, Charlott, Michael, Martha, Sealy, Patience, Tomlinson, Salle and James Washington the following negroes, viz: Old Dick, Suckie, Ben, Adam, Young Dick, John, George and Daniel,

and I also will and bequeath unto them the children named above in this item my river plantation and the Aquilla tract, and Mitchael home place on which I now live, except one hundred acres, on the south side adjoining my Taylor tract which property negroes and land I desire to be applied to the making of my younger children named above in this item, equal in property to my oder [sic] children named in the third item, and should the property named in this item fail to do so I will and desire a sufficient amount of money to be added thereto, to affect the quality desired in this item.

Item 5 of said will reads as follows:

5th. I will and desire that each of my younger children draw his or her portion under the 4th item as he or she may become of age.

Item 15 of said will reads as follows:

15th. I will and desire that all the property herein and hereby bequeathed unto my girl children, both of the older and younger set, go to them, and then to their children.

Appraisers were appointed and did set aside to Martha A. Toland, 109 acres of land (the land in question in this case), said proceedings recorded in Will Book 13, pages 477-478 in the Office of the Ordinary of Jasper County, Georgia.

Our contention is that my clients, the children and grandchildren of Martha A. Toland (She later married Sanders and after his death married Bowdoin) own this land in [fol. 105] fee simple by reversion after the death of Martha, (sometime known as Mattie A.). On January 4, 1873 Mattie A. Sanders (same as Martha A. Toland) deeded the 109 acres of land to E. R. Roberts by deed recorded in Deed Book F page 493, Clerk's Office, Jasper Superior Court.

We contend that this deed only conveyed a life estate in said lands and upon the death of the said Mattie A or Martha A. Toland Sanders Bowdoin, then said lands reverted to petitioners in this case and they have been

in constructive [sic] of said land under said title since that time.

From an examination of the title I find that E. R. Roberts on December 12, 1900 deeded R. C. Brown 870 acres, more or less, of land by deed recorded in Deed Book L page 625 of said Clerk's Office. From the description I believe this land includes the land involved in this case. By other conveyances apparently a large tract recited by estimate to be 1837 acres went into Thomas D. Stewart and Mrs. Pearl B. Arnold and these two grantors deeded to United States of America said land on June 6, 1936, deed recorded in Deed Book A-3-540-541 said Clerk's Office, which apparently includes the 109 involved in this suit.

From these facts I conclude that United States of America is also in constructive possession of said 109 acres of land, but its possession is not under a claim of right for the reason that there was no disclaimer and re-entry after the death of Mrs. Martha A. Toland Sanders Bowdoin and the true title is in petitioners in this case referred to. I cite the following Code Section:

George Code, Section 105-1405. DISPUTED POSSESSION; LEGAL TITLE.—Where two persons claim to have actual [fol. 106] possession of the same land, he shall be deemed in possession who has the legal title, and the other is a trespasser.

I will be glad to exhibit my entire file to you gentlemen, or such authority as you designate to see if we can reach some mutual conclusion without the necessity of a trial.

Cordially yours,

/s/ W. B. Mitchell
W. B. MITCHELL

WBM:m

CC: Mr. Buford Malone, Jr.,
Manager,
Interior [sic] Department Lands,
Hillsboro, Georgia.

[fol. 107]

# IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18222

JAMES A. BOWDOIN, ET AL., APPELLANTS

versus

BUFORD MALONE, JR., and UNITED STATES OF AMERICA, APPELLEES

Appeal from the United States District Court for the Middle District of Georgia

OPINION DENYING APPELLEES' PETITION FOR REHEARING BY THE COURT, RIVES, CIRCUIT JUDGE, DISSENTING, FILED: February 23, 1961

*On Appellees' Petition for Rehearing and Brief and Supplemental Brief in Support Thereof.*

Before RIVES, CAMERON and BROWN, Circuit Judges.

PER CURIAM: Appellee Buford Malone, Jr., as Forest Service Officer, Department of Agriculture, has filed, through attorneys of the Department of Justice of the [fol. 108] United States, a petition for rehearing, together with a brief in support thereof and a supplement to that brief, together with motion for leave to file the supplement. The motion is granted, and the supplemental brief has been considered by the Court.[1]

We reject without discussion the point raised in the supplement to appellee's brief. It brings to our attention certain correspondence between the attorneys for the parties. This correspondence was not before the lower court and is not contained in the record of this appeal. It deals largely with facts which appellee Malone

[1] The United States, which had entered its appearance and joined in Malone's motion to dismiss, has not joined in the petition for rehearing. The judgment entered pursuant to the opinion heretofore rendered in this case approved the judgment of the court below in dismissing the action insofar as the United States was concerned.

claims demonstrate that the present action is barred by limitations. The action was decided by the court below upon the face of the complaint filed by appellants and the motion to dismiss filed by appellee below, along with the United States.[2] That is all which was before the court below and which was involved in this appeal and we decline to consider the matters discussed in the supplemental brief of appellee Malone, as such a possible defense on the part of appellee was not before the court below and is not before us.

We pass over without discussion as having been sufficiently dealt with in our opinion three points made [fol. 109] in the petition for rehearing,[3] and we confine this opinion to a response to the argument presented in Point IV of the petition for rehearing in which it is claimed that "The majority opinion is based upon an erroneous premise as to Georgia law." We do this in part because of the statement in our opinion: "It is manifest from the Georgia statutes quoted and referred to, as well as the decisions cited, that the common law action of ejectment in Georgia involves possession alone, that the only process issuable to the victor is a writ of possession, together with damages, and that 'the writ of possession shall not issue against third persons not known in the suit on which such writ of possession is founded, . . .'"

That statement in the opinion meant, of course, that the common law action of ejectment in Georgia, as sought to be invoked and applied by the appellants in this case, involves possession alone. The quoted statement was followed by our statement in the opinion:

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[2] The court below dealt with certain admissions which had been made in pretrial hearings. No question was raised as to whether these were properly before the court on the motion to dismiss, so that we raise no question, but have considered the admissions as included in the written opinion of the court below as being properly before the Court upon the motion to dismiss.

[3] That our opinion I "regresses to the discredited view that whether a suit is against the United States is determined by its presence as a formal party defendant;" and that our opinion II is in conflict with the decisions of the Supreme Court, and III of this circuit and other circuits.

> "The sole question presented, therefore, is one of law: is appellee Malone, under the admitted facts, entitled to have the action against him dismissed solely on the ground that he is protected by the asserted sovereign immunity of the United States?"

That is an accurate statement of what was tried before the court below, what was decided by that court, and [fol. 110] what was argued before us in the original presentation of this case. No contention was made that the action of ejectment here involved differed from the action of ejectment dealt with in *United States* v. *Lee*, 1882, 106 U.S. 196, and we made no effort to analyze the statutes and decisions of Georgia to demonstrate that the action of ejectment before the lower court and before us was identical in character and scope with the action involved in *Lee*.

The fact is that Ejectment, as dealt with in Title 33 of the Code of Georgia Annotated, is a comprehensive and flexible remedy. Assuming that, under the Georgia decisions relied upon by appellee in its petition for rehearing[4], the remedy by ejectment has been expanded so as to permit suits to try title to land, there is nothing in any decision we have found which limits the remedy to such a class of actions. Many provisions of the statute reject the thought that the common law action of ejectment, an action at law, has been converted into an exclusively equitable action to quiet title to land, or even to try title.[5]

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[4] Vinson v. Cannon, 1957, 213 Ga. 339, 341, 99 S.E.2d 108, 109;
Lopez v. Downing, 1872, 46 Ga. 120;
Brewster v. Wooldridge, 1897, 100 Ga. 305, 306, 308-311, 28 S.E. 43, 44-45;
Bright v. City of Washington, 1957, 57 G. App. 84, 86, 97 S.E.2d 163, 164, certiorari denied;
Ramey v. O'Byrne, 1904, 121 Ga. 516, 520, 49 S.E. 595, 597; and
Sweat v. Atlantic Coast Line R. Co., 5 Cir., 1936, 81 F.2d 492, 493.

[5] E.G., § 108 of the chapter vests the right to maintain the action in a single joint tenant or other person claiming only a part interest in the lands involved without joining any other

[fol. 111] The opinion rendered by the court below, appearing in the record and now reported in . . . . F. Supp. . . . ., shows that its judgment dismissing the action was predicted upon the petition of appellee Malone alone, stating: "Plaintiff frankly concedes that he cannot maintain this action against the United States itself;" and the decision was rendered in favor of Malone solely on the basis that, in possessing the land, he was acting as agent of the United States, which had not consented to be sued. While the petition for rehearing and the briefs filed in support thereof are somewhat confused, the real contention presented is that the United States was an indispensable party and that the action ought to have been dismissed by the court below on the ground that the suit could not proceed without bringing the United States in.

One of the cases chiefly relied upon to sustain that position is our recent decision in *Stewart* v. *United States*, 1957, 242 F.2d 49. We do not think that appellee's position is sound. *Stewart* involved an action seeking to quiet [fol. 112] title generally against all the world.[6] We held

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person with him, with the proviso that the judgment shall "not affect the rights of those interested in such lands or tenements who are not parties to the suit." § 114 gives the plaintiff the right to make the true claimant defendant and to bind him by the judgment. § 115 confers the right in the plaintiff to make a previous warrantor of title to the land a codefendant. § 120 gives the right to the plaintiff to have a writ of possession against the defendant, including a money judgment for mesne profits. And § 121 denies the right of plaintiff to obtain a writ of possession against third persons "not known in the suit." Implicit in the whole chapter and the decisions under it is the rule that the plaintiff may choose whom he shall sue and his judgment will be binding only upon the person or persons properly brought before the Court.

In one of the cases relied upon by the appellee, Ramey v. O'Bryne, 121 Ga. 516, 49 S.E. 595, 597, the Supreme Court of Georgia refers to ejectment as a mixed action partly for tort, and partly for trial of title. And see also Nottingham v. Elliot, S.Ct. Ga. 1953, 209 Ga. 481, 74 S.E.2d 93.

[6] See 242 F.2d p. 50: "The amended complaint prayed that title to the described mineral interests be quieted in plaintiffs, that all clouds and encumbrances be cancelled, that the condemnation proceedings [by which the United States acquired the title which it passed on, as far as the minerals were concerned, to Placid

that, in such an action, the United States, through whom the others were claiming title, was an indispensable party, basing our holding largely on our prior cases of *Hudson* v. *Newell*, 1949, 172 F.2d 848, and cases cited, and *Mackintosh* v. *Marks' Estate*, 1955, 225 F.2d 211. We stated the general rule concerning indispensable parties to be:[7]

> "It is well settled under the decisions of this Court that no decree can be entered affecting the title to property or cancelling any cloud thereon unless all of the parties interested in the title or in the particular cloud and who will be directly affected by any judgment that may be rendered are properly before the Court."

In *Hudson* v. *Newell* we reversed the action of the lower court in dismissing a suit to quiet title generally to certain lands, as provided by Mississippi statutes using this language:

> "If they can prove the land and oil are theirs we see no reason why shey should not have judgment for them against those sued; possible claimants not in court would not of course be bound by the result. [fol. 113] If such claimants' title is shown as a defense their interests can be saved from the decree. . . .
>
> "We therefore hold that while the full relief prayed cannot be given with only the parties before the court a limited relief can be, and the suits should be retained to enquire into it."[8]

In *Mackintosh*, we cited *Hudson supra*, as authority and held:

> "Plaintiffs are entitled to any relief which the facts justify even though that relief has not been asked and that theory has not been advanced in the pleadings. . . .

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Oil Company and others] be reviewed and corrected, that the oil and gas leases be cancelled and declared void, and that the parties be enjoined from performing them."

[7] 242 F.2d 51.

[8] 172 F.2d pp. 851 and 853.

"The first reason is that the rights of the royalty owners would continue to exist irrespective of the outcome of the present suit. The royalty owners who deraign their title from the appellants are protected under their warranty of title, both express and implied. . . .

". . . The power of a court of equity so to mold its decree as to do complete justice between the parties without adversely affecting those not before the court is exceedingly broad and elastic. . . .

". . . the court should retain jurisdiction and limit any relief granted to such as can be given without prejudice to the absent parties." 225 F.2d at 214-215.

Certainly, under these decisions, the United States was not an indispensable party here. It had been eliminated in effect by consent. It is difficult to discern what relief [fol. 114] was sought against the United States by the common law complaint in ejectment in the John Doe proceeding. Taking the averments of that complaint, as supplemented by the statement of the court below that plaintiffs (appellants) conceded that the suit against the United States could not be maintained as true, we think it is clear that, under *Lee*, a judgment can be entered by the court below which will grant appellants some relief without adversely affecting the interests of the United States. In fact, this was in effect conceded by the appellee in the original brief.[9]

Several times in the petition for rehearing, the appellee claims that title was put in issue by the denial of appellants' title by appellees. Of course, there was no responsive pleading at all, and the averments of the

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[9] In which this statement appears on page 10: "While the United States would not be bound by a judgment against Malone, its interests in managing the property would be affected and a doubt would be cast upon its title until directly litigated by the United States with the appellants." Such an incidental impact upon the interests of the United States would not make it an indispensable party, and the same contention was directly rejected in Lee.

complaint must be taken as true in passing upon the motion to dismiss.

The petition for rehearing is

DENIED.

RIVES, Circuit Judge: I dissent.

[fol. 115]

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No. 18222

JAMES A. BOWDOIN, ET AL,

versus

BUFORD MALONE, JR., and UNITED STATES OF AMERICA

ORDER DENYING REHEARING—Feb. 23, 1961

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fols. 116-119] • • • •

[fol. 120] CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT OMITTED IN PRINTING

[fol. 121]

## SUPREME COURT OF THE UNITED STATES

• • • •

**ORDER ALLOWING CERTIORARI—Filed October 9, 1961**

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 617818 329

## QUESTION PRESENTED

Whether an action may be maintained to eject a federal officer from lands claimed by the United States, where the officer is sued in his official capacity and is admitted to be acting only within his statutory authority, and there is no claim that he acts unconstitutionally.

## STATEMENT

This is an action, in the fictitious form of ejectment, brought in a court of the State of Georgia against Buford Malone, Jr., the petitioner, alleging ouster from certain lands with resulting damages to the respondents (R. 5–6).[1] The petitioner removed the action to the federal district court on the ground that the land involved was part of a national forest and that he was acting only in his official capacity as a Forest Service Officer of the Department of Agriculture (R. 2–4). At a pre-trial conference, the respondents admitted that the petitioner "was acting solely under color of his office as a Forest Service Officer" and that "his official duties * * * required him to be, and he was, in charge and in possession of the land described in" the complaint (R. 20–21). Accepting those concessions, the district court dismissed the action for lack of jurisdiction, holding that it was in substance a suit against the United

[1] The United States was originally made an additional party defendant, but the respondents thereafter conceded that the action could not be maintained against the United States itself (R. 21) and the dismissal of the action against it is not contested.

States for which consent had not been given (R. 20–23). The court of appeals, with one judge dissenting, reversed (pp. 1a–23a, *infra*). A petition for rehearing *en banc* was denied by the same three-judge panel, again with one dissent (pp. 24a–31a, *infra*).

## REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with the decision of this Court in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682. The court of appeals made no attempt to conceal its preference for the dissent in that case, and its opinion can fairly be characterized as an invitation to this Court to reconsider and overrule the *Larson* rationale.

In the *Larson* case, the War Assets Administrator, believing the plaintiff had failed to comply with the terms and conditions of a sale to it of surplus coal, cancelled the sale and proposed to sell the coal to another buyer. The plaintiff, claiming title to the coal, brought an action against the Administrator to enjoin the alleged "conversion" of its coal. This Court held the action to be in substance one against the United States and hence barred by sovereign immunity (p. 695):

> * * * We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency. A Government officer is not thereby necessarily immunized from liability, if his action is such that a liability would be imposed by the general law of torts.

**But the action itself cannot be enjoined or directed, since it is also the action of the sovereign.**

Since the administration of sales contracts was within the delegated powers of the Administrator, his action in withholding delivery of the coal on the basis of his interpretation of the contract was "authorized" even if "illegal" as a matter of contract or tort law.

The principles reaffirmed in the *Larson* opinion, after an exhaustive examination of the prior cases, are directly controlling here. There is no claim either that petitioner was acting beyond the scope of his delegated powers or that those powers were unconstitutionally conferred. As the court of appeals recognized, petitioner's "official duties required him to be, and [he] was in fact, in charge and possession of the land described in the ejectment action under color of his office representing the United States" (p. 3a, *infra*). Being authorized in the agency sense and not unconstitutional, petitioner's actions were, under the *Larson* decision, the actions of the United States and a suit for specific relief against him is a suit against the United States.

The sole attempt of the court of appeals to reconcile its decision with *Larson* v. *Domestic & Foreign Corp.* is based upon this Court's introductory observation that "There is not involved any question of the immunization of Government officers against responsibility for their wrongful actions" (337 U.S. at 686; pp. 18a–19a, *infra*). The present case is different, the court of appeals concludes, because here the claim is that petitioner "is wrongfully and tortiously holding pos-

session of [respondents'] lands as agent for the United States, which does not have the right of such possession" (p. 19a, *infra*). The purported distinction does not exist. In the quoted sentence, this Court was merely separating (a) the question whether a suit, purportedly against an officer, is in effect a suit against the sovereign and (b) the quite different question whether the officer himself, by virtue of his official position, has a personal immunity from suit and from personal liability. It was not, as the court of appeals implies, suggesting that the officers' actions were not claimed to be "wrongful." To the contrary, it was precisely in those terms that the Court itself stated the plaintiff's claim (p. 692):

> * * * If, says the respondent, an officer of the Government wrongly takes or holds specific property to which the plaintiff has title, then his taking or holding is a tort, and "illegal" as a matter of general law, whether or not it be within his delegated powers. He may therefore be sued individually to prevent the "illegal" taking or to recover the property "illegally" held.

Since the whole of the opinion in the *Larson* case was devoted to answering that very argument, the court of appeals' differentiation of the instant case on the ground that the actions here are claimed to be "wrongful" and "tortious" is unsound.

The court of appeals relied primarily on *United States* v. *Lee*, 106 U.S. 196, and *Land* v. *Dollar*, 330 U.S. 731, and found it "significant * * * that the Supreme Court [in *Larson*] did not overrule *Lee* or *Dollar*, essaying merely to distinguish those cases" (p. 19a,